No. 93-1883

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In The
Supreme Court of the United States
October Term, 1994

ELOISE ANDERSON, in her official capacity as Director of the California Department of Social Services, and RUSSELL GOULD, in his capacity as Director of the California Department of Finance,

Petitioners,

v.

VERNA EDWARDS, Guardian ad Litem for Vernais Edwards, et al.,

Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

RESPONDENTS' BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether California's policy of requiring non-sibling children to be combined into one Aid to Families with Dependent Children (AFDC) assistance unit, thereby reducing the children's AFDC benefits because they live with relatives who also receive AFDC but who are not legally responsible for the children's support, violates federal regulations that prohibit states from reducing or prorating benefits solely because of the presence in the household of a non-legally responsible relative and from imputing income that is not actually available.

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ELOISE ANDERSON, in her official capacity as Director of the California Department of Social Services and RUSSELL GOULD, in his capacity as Director of the California Department of Finance,

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RESPONDENTS' BRIEF ON THE MERITS

Respondents Verna Edwards, Guardian ad Litem for Vernais Edwards, et al., hereby submit their Brief on the Merits.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, reported as Edwards v. Healy, 12 F.3d 154 (9th Cir. 1993), is reproduced in the Appendix to the Petition for Writ of Certiorari (hereinafter "Pet. App."), beginning at Pet. App. 1. The opinion of the United States District Court for the Eastern District of California is not reported but is reproduced beginning at Pet. App. 15.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

The relevant statutory and regulatory provisions, other than those previously set out in the Appendix to the Petition for Writ of Certiorari, are set out in the appendix hereto.

Those provisions are: 42 U.S.C. §602(a)(7)(A); 42 U.S.C. §602(a)(38); 42 U.S.C. §605; 42 U.S.C. §612; 58 Fed. Reg. 60,134 (November 15, 1993).

STATEMENT OF THE CASE

The respondents are indigent orphaned or abandoned children and the relatives who care for them. The children have been taken in by relatives who are not their parents or siblings, and who are not legally responsible for supporting them. They challenge a California Aid to Families with Dependent Children (hereafter "AFDC") policy which reduces their monthly AFDC benefits by requiring the abandoned children to be placed in the same assistance unit with relatives who are not responsible for their support.

Eligibility for AFDC is based on financial need. Children may receive AFDC if the income actually and legally available to them is less than a minimum subsistence level set by the state. 42 U.S.C. §602(a)(18); 45 C.F.R.

§233.20(a)(3)(xiii).

AFDC payments are made on behalf of the recipients who are in the same assistance units (AUs). California increases the grant for each additional member of an AU by an incremental amount which decreases as the number of individuals in the assistance unit increases. (Petitioners' Brief on the Merits, p. 14, hereafter Pet.). All of the income and resources of everyone in the assistance unit are taken into consideration in establishing the benefit payment. 42 U.S.C. §602(a)(7)(A). Thus, when a member of the assistance unit receives income other than AFDC, such as earnings, Social Security benefits, or a personal injury award, the AFDC grant to the entire AU is reduced based on that income. Id.

Federal law requires that all parents and siblings must be in one assistance unit. 42 U.S.C. §602(a)(38). Similarly, when a needy caretaker with no children of her own applies for aid with a related child, she is required to be in the same assistance unit as the child. 42 U.S.C.

§602(a)(7)(A).

California's consolidated filing unit rule, California Eligibility and Assistance Standards Manual of Policies and Procedures (hereafter "MPP") §82-824.1,[1] requires all children with the same caretaker to be combined into one unit. This rule applies regardless of whether the children or the caretaker have a legal obligation to support one another. In combining these persons into one unit, the state treats the AFDC grant itself and any outside income as available to all members of the assistance unit.

This policy reduces the AFDC benefit for those forced to consolidate. For example, when a child receiving $299 in her own AU is combined with a relative's AU containing two other people, the payment to the new AU increases by the incremental amount of only $117 - a reduction of $182 from $299.[2]

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[1]Formerly §44-205.31. Both are set out in full in Pet. App. 51-52.

[2]By contrast, a child placed with a wealthier relative who does not receive AFDC would receive the full $299.

Respondents' situations illustrate how California's policy affects families. Respondent Verna Edwards is a disabled woman, who does not receive AFDC for herself. She took her granddaughter, Vernais, into her home and received $341[3] per month for her needs. Mrs. Edwards' grandnieces, Pamela and Ericka, later came to live with her. Since there was no other relative willing take in Pamela and Ericka, they would likely have been placed in foster care if Mrs. Edwards had not become their caretaker. R. 21, Exhibit 5, p. 11, ¶1; p. 2, ¶7; p.3, ¶¶8, 9, 10.[4]

Initially, Pamela and Erika were placed in their own two-person AU, and issued a $560 per month AFDC grant.

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[3]Since the outset of this case, the state has reduced the AFDC grants. Throughout the brief, respondents use the current grant amounts. To be consistent with the reference to Mrs. Edwards' declaration, however, the grant amounts listed here are the ones paid at the commencement of this action.

[4]The transcript of the record on appeal does not have continuous page numbers. The Clerk's Excerpt of Record for Appeal contains, at Tab H, the docket sheet listing all the proceedings. Respondents, when citing to the record, use the docket number as the Record Number, and use the pagination as actually listed on the document cited.

Mrs. Edwards therefore received a total of $901 for the care of her relatives' children. However, under California's consolidated assistance unit filing rule, the two separate units in the household were later consolidated into one three-person AU, which reduced the total AFDC grant to $630. R. 21, Exhibit 5, p. 3, ¶11; p. 15, ¶16.

The dramatic drop in income greatly destabilized the Edwards household. Their nutrition suffered -- Mrs. Edwards could seldom afford fresh foods, meat, or milk and was not able to "give them much more than beans." Mrs. Edwards was forced to borrow money against her mortgaged home to try to meet her mounting bills. She used her own money for the children, and went without adequate clothing and therapeutic shoes for herself. R. 21, Exhibit 5, p. 16, ¶19, 20; p. 18, ¶25.

Respondent Barbara Moore was receiving AFDC benefits for her minor daughter and son. When another daughter became incapable of caring for her children, Mrs. Moore took in the two grandchildren, even though she only

received an incremental grant for them. When this same daughter later gave birth to twins, Mrs. Moore became their caretaker too. Mrs. Moore did not get enough AFDC to buy enough nutritious food, toothpaste, cleaning supplies, feminine products, cold remedies, diapers, or to pay her phone bill. She was forced to borrow money from a loan shark. As a result of the financial stress, Mrs. Moore was forced to call Children Protective Services to have the twins placed in foster care. R. 21, Exhibit 7, p. 27, ¶¶1, 2; p. 28, ¶¶5, 6; p. 29, ¶¶7, 8; p. 30, ¶¶9, 10; p. 31, ¶¶12, 13.

Respondent Vanessa Hamilton receives AFDC for herself and her two sons, Johnny and Cleo. She also cares for three orphaned children of her two deceased sisters. She received about $377 per month in AFDC to care for her three nephews. R. 21, Exhibit 6, p. 19, ¶¶1, 2, 3; p. 2, ¶7.

The financial hardship caused by receiving only $377 per month for the additional children caused emotional problems for her own children. Her children suffered

shame and embarrassment caused by their poverty: being too poor to buy school lunches, sufficient clothing and the supplies necessary to participate in school activities. R. 21, Exhibit 6, p. 19, ¶2.

The consolidated filing unit rule also affects households with income other than AFDC. If a mother, daughter, and niece were in one assistance unit, and the daughter received a personal injury award for a disfiguring car accident, the federal "lump sum" income rule would apply to all the household members. Under this rule, everyone in the assistance unit would be disqualified for aid for the amount of time that the daughter's income should support the household.[5] The niece would be barred from aid because of her cousin's income. MPP §82.824.1.

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[5]42 U.S.C. §602(a)(17) provides that a lump sum will be considered income to all members of the AU, and when a member of the AU receives a lump sum, the entire AU is ineligible for a period that equals the sum of all income divided by the standard of need. 42 U.S.C. §602(a)(17).

Respondents brought suit to challenge this policy. On cross motions for summary judgment, the district court struck down the California policy, holding that Beaton v. Thompson, 913 F.2d 701 (9th Cir. 1990), was binding authority in this case. The Court of Appeals affirmed the decision of the district court, Edwards v. Healy, 12 F.3d 154 (9th Cir. 1993).

SUMMARY OF THE ARGUMENT

California's consolidated assistance unit rule violates the language, history, and purpose of the federal "availability" regulations, which are designed to protect the economic security of children on AFDC.

One availability regulation prohibits a state from "assuming the availability of income" for "any individual" other than a parent or stepparent. 45 C.F.R. §233.90(a)(1). A second regulation prohibits a state from reducing the amount of AFDC or assuming a contribution of support "because of the presence in the household of a non-legally responsible individual." 45 C.F.R. §233.20(a)(2)(viii). A

third regulation flatly prohibits a state from considering income from any source unless it is "actually available and ... the recipient ... has the legal ability to make such sum available for support and maintenance." 45 C.F.R. §233.20(a)(3)(ii)(D).

The California policy forces extended families onto a single AFDC grant (or assistance unit), even though they have no legal obligation to support one another. The effect of this policy is to count income and reduce benefits in a manner which is prohibited under the availability regulations.

California claims that its scheme merely recognizes the economies of scale available to the people in a household. However, Congress has mandated a specific system that states must follow if they choose to take into account the economies of scale of joint living situations. This system is the only authorized exception to the bar on reducing benefits based on the presence of non-legally responsible persons in the household. 42 U.S.C. §612. In

violation of the availability regulation 45 C.F.R. §233.20(a)(2)(viii), California seeks to reduce benefits based on its own version of economies of scale. As a result the children are deprived of the statutory protections mandated by Congress which ensure the plan be reasonable.

California's other attempts to justify its policy are equally without merit. The state claims that it has broad discretion to define assistance units, which allows it to avoid the availability requirements. Although states do have flexibility in designing their AFDC programs, that flexibility cannot be used to contradict federal rules. Shea v. Vialpando, 416 U.S. 251, 266 n.13 (1974).

Furthermore, the state's assertion that it has virtually unfettered discretion to create assistance units ignores the fact that, historically, caretaker relatives, not states, have had the right to choose whether to exclude or include themselves and each individual child in the assistance unit in order to meet the family's basic needs. Bowen v. Gilliard, 483 U.S. 587, 593 (1987). In 1984, Congress

expressly created a limited exception to this right by requiring all members of nuclear families to be in a single assistance unit if they lived together. Petitioners' policy invalidly expands the list of relatives to whom this requirement applies to aunts, uncles, cousins and other individuals whom Congress never intended to include. Such an unauthorized expansion violates federal law and regulations. See, Townsend v. Swank, 404 U.S. 282 (1971).

The state also argues that the obligation of a caretaker to spend AFDC on the children under 42 U.S.C. §605 somehow imposes a legal duty of support upon the caretaker relative. Therefore, they claim that the availability regulations are not violated. The statute does not support the assertion that a non-parent has a legal duty of support. Furthermore, such an obligation, even if it did exist, still would not justify the result of the consolidated assistance unit rule, which both counts non-AFDC income against all the assistance unit members and presumes children without

a duty of support, as well as the caretaker relative, will support one another. The irrebuttable presumption that non-siblings with no legal duty of support will share income violates the plain language of the availability regulations.

The United States Department of Health and Human Services (hereafter "HHS") only recently addressed the specific issue involved in this case, in a 1994 HHS Action Transmittal. ACF-AT-94-6 (hereafter "AT-94-6). However, that transmittal, which has never been issued under the Administrative Procedure Act, is not entitled to deference because it relies on faulty reasoning, ignores the plain language of the regulations at issue, and contradicts the original intention of the Secretary of Health, Education and Welfare as expressed when these regulations were originally adopted. See Thomas Jefferson University v. Shalala, 512 U.S. ____, 114 S.Ct. 2386-87 (1994). Furthermore, federal policy memoranda not promulgated pursuant to the Administrative Procedures Act cannot change the plain meaning of federal regulations.

Finally, California's rule violates federal regulations which require AFDC recipients be treated equitably and in a manner consistent with the purposes of the AFDC statute. The AFDC program is designed to "strengthen family life," provide "maximum self-support," and "encourage the care of children ... in the homes of relatives." 42 U.S.C. §601. However, by lowering grants to related caretakers who want to take in abandoned and neglected children, California discourages relatives, in contravention of §601, from caring for those children. California's policy is inequitable because it increases the economic insecurity of families, reduces the support available to the entire household, and destabilizes the lives of the very children the AFDC program is supposed to help.

ARGUMENT

I. THE STATE'S CONSOLIDATION RULE VIOLATES FEDERAL REGULATIONS BY PRESUMING THAT INCOME OF NON-LEGALLY RESPONSIBLE RELATIVES IS AVAILABLE TO THE CHILDREN AND THAT CHILDREN'S INCOME IS AVAILABLE TO OTHERS

A. Statutory and Regulatory Background.

The AFDC program is a joint federal-state public assistance program. 42 U.S.C.§601. State participation in the AFDC program is voluntary. Once a state elects to participate, however, it is required to provide aid and services consistent with the Social Security Act and federal regulations. King v. Smith, 392 U.S. 309, 316-17 (1968). Although states have flexibility in designing their AFDC programs, that flexibility cannot be used to circumvent federal rules. Shea v. Vialpando, 416 U.S. 251, 266 n.13 (1974).

Congress created the AFDC program to "maintain and strengthen family life" and to "encourag[e] the care of dependent children in their own homes or in the homes of

relatives." 42 U.S.C. §601. In the development of the AFDC program, two protections emerged to help ensure that recipients receive the benefits that would meet their basic needs. First, states were allowed to take into account only income and resources which are actually available and which the owner has a legal obligation to spend on the needy child. King v. Smith, 392 U.S. 309; Lewis v. Martin, 397 U.S. 552 (1970); Van Lare v. Hurley, 421 U.S. 338 (1975). This is known as the availability principle and has been codified in three federal regulations. 45 C.F.R. §233.20(a)(2)(viii); 45 C.F.R. §233.20(a)(3)(ii)(D); and 45 C.F.R. §233.90(a)(1). The availability principle prevents states from imputing support from caretakers who are not legally responsible to provide it. A second related protection emerged -- caretaker relatives had the right to choose whether to exclude or include themselves and each individual child in the assistance unit in order to meet the family's basic needs. Gilliard v. Craig, 331 F. Supp. 587, 593 (W.D.N.C. 1971) aff'd, 409 U.S. 807 (1972); Bowen

v. Gilliard, 483 U.S. 587, 593 (1987) (citing S. Print No. 169, 98th Cong., 2d Sess. 980 (1984).

Through the years Congress placed some limitations on these rights. Congress required consideration of the income of some individuals who do not have a legal obligation to support the needy child. These individuals include stepparents, 42 U.S.C.. §602(a)(31); sponsors of legal aliens, 42 U.S.C. §615; and grandparents in three-generation households, 42 U.S.C. §602(a)(39). In 1984 Congress enacted a limited exception to a family's freedom to choose whom to include in an assistance unit by requiring all parents and siblings to file as one unit. 42 U.S.C. §602(a)(38). In making this change, Congress explicitly recognized that it was imposing a limit on the choice which would otherwise be left up to the family.

> There is no requirement in present law that parents and all siblings be included in the AFDC filing unit. Families applying for assistance may exclude from the filing unit certain family members who have income which might reduce the family benefit.

S. Print No. 169, 98th Cong., 2d Sess. 980 (1984).

In recognition of the savings families achieve in shared living situations, Congress enacted in 1980 another limitation on these principles providing a specific mechanism for states to take into account economies of scale. 42 U.S.C. §612. This statutory provision sets out the method by which states can take group living savings into account without violating the availability principle: creating a proration plan pursuant to 42 U.S.C. §612.[6]

B. Petitioners' Rule Violates the Availability Regulations.

Petitioners' consolidation rule violates the clear language of several federal regulations which prohibit states from presuming, without any proof, the availability of income to AFDC children. These provisions prevent the state from "conjuring fictional sources of income and resources by imputing financial support from persons who have no obligation to furnish it ..." Heckler v. Turner, 470 U.S. 184, 200 (1985). Federal regulations prescribe what

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[6]Petitioners have never disputed that California's consolidated assistance unit rule is not such a plan.

income can be counted when determining the AFDC eligibility and benefit levels. Income can be counted only when it is actually available and the applicant has a legal interest in the funds and the legal ability to make them available. 45 C.F.R. §233.20(a)(3)(ii)(D).

45 C.F.R. §233.90(a)(1) prohibits states from assuming the availability of income based on the presence of anyone other than a parent or stepparent in the household. 45 C.F.R. §233.20(a)(2)(viii) prohibits states from prorating or reducing the amount presumed necessary to support needy children solely because of the presence in the household of a non-legally responsible individual and from assuming any contribution from non-legally responsible persons in the household. All these provisions prohibit California from assuming that the income of non-legally responsible caretaker relatives and non-sibling children are available to abandoned children who live with them, and from reducing the AFDC benefits of a child merely because of the presence of non-legally responsible

individuals in the household. Petitioners' consolidation rule violates the clear language of the availability regulations.

1. 45 C.F.R. §233.20(a)(2)(viii) Prohibits States From Reducing or Prorating or Assuming a Contribution of Support Based Upon the Presence of a Non-Responsible Person.

45 C.F.R. §233.20(a)(2)(viii) requires the state to:

> [p]rovide that the money amount of any need item included in the standard will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally responsible individual; and the agency will not assume any contribution from such individual for the support of the assistance unit except as provided in paragraphs (a)(3)(xiv) and (a)(5) of this section and §233.51 of this part.[7]

The regulatory history confirms that the regulation means what it says. In responding to comments and questions regarding the regulation's application, the Department of Health, Education, and Welfare (HEW)

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[7]45 C.F.R. §233.20(a)(3)(xiv) concerns when the income of a stepparent is available to the child. 45 C.F.R. §233.20(a)(5) concerns proration of shelter and utilities pursuant to 42 U.S.C. §612. 45 C.F.R. §233.51 concerns the eligibility of sponsored aliens.

(HHS' predecessor) declared, "[t]here is no legal basis for forcing or requiring a contribution from a non-legally liable individual." 42 Fed. Reg. 6583 (Feb. 3, 1977) (emphasis added). Furthermore, the agency rejected the position that the regulations do not apply to all shared households, stating that there is "no basis for making a distinction between non-legally liable individuals depending on where the [AFDC] child's home is." Id.

By forcing the combination of two AUs, the California policy assumes contributions of support between non legally responsible relatives and thereby reduces the money available to pay for necessities solely because of the presence in the household of a non-legally responsible individual. For example, Mrs. Edwards' granddaughter was receiving an AFDC grant for one person ($299). After her grandnieces began living with Mrs. Edwards, the total AFDC available to meet the granddaughter's needs was reduced from $299 to $202 (the grant for one versus the per capita amount, based on a $607 for three children). This

reduction occurred solely because of the presence in the home of the grandnieces, who are not legally responsible for the granddaughter. The California policy clearly prorates or otherwise reduces the amount of AFDC provided to these children "solely because of the presence . . . of a non-legally responsible individual" in violation of 45 C.F.R. §233.20(a)(2)(viii), by using a means other than a permissible §612 prorating plan.[8] It also presumes a contribution of support between the non-siblings. The Solicitor General's argument that the amount paid to the family is not reduced, but actually increased, is disingenuous. (Brief for the United as Amicus Curiae of Respondents 9, hereafter S.G.) This ignores that the state is consolidating two units. As evidence by this example, but for the consolidated assistance unit rule, the families would receive substantially more money.

Petitioners argue that this regulation applies only after they consolidate the AU, and was not meant to bar the

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[8]See Section II.C., supra p. 54-58.

states from assuming the availability of income between members of an assistance unit. (Pet. 35).

However, since California acknowledges that the availability principles apply once the composition of the AUs are established under the 42 U.S.C. §602(a)(38) "family filing unit rule," the state is precluded from arguing that the availability principles have no effect on the state's ability to combine separate AUs into one unit. (Pet. 12, 21.) In other words, for example, the state acknowledges that pursuant to (a)(38), a household composed of an aunt, her niece, and her two children constitutes two AUs: the aunt and her children in one and the niece in another.[9] The availability principle (which looks to income outside the AU) results in a determination that the aunt's income is not available to the niece, and similarly, the niece's income

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[9]The plain language of the consolidated assistance unit rule, M.P.P. §84-824.13 is that: "Two or more AUs in the same home shall be combined into one AU..." Since the availability rules apply once an AU is determined, they certainly would apply when deciding whether it is permissible to consolidate two or more AUs.

cannot be assumed to be available to the aunt and her daughter. However, once the state "combines" these two AUs into one, under the consolidated assistance unit rule, M.P.P. §84-824.13, the aunt's income is automatically deemed available to the niece, since they are now in the same AU. Through the consolidated assistance unit rule, the state tries to evade application of the availability principle.

The Solicitor General argues that since 42 U.S.C. §605 creates a legal duty of support on the part of the caretaker, this regulation is not violated by petitioners' rule. (S.G. 16.) Despite the requirements of §605, a caretaker relative remains a non-legally responsible individual. (See supra p. 58-60.) However, even assuming for the sake of argument that the caretaker has a duty of support, the non-siblings have no similar duty, yet the policy presumes they will also contribute to one another.

California's irrebuttable presumption of a contribution of support has the effect of "otherwise reduc[ing]" and

"prorat[ing]" the amount presumed necessary to support these children and assumes a contribution of support from non-legally liable individuals.[10]

2. 45 C.F.R. §233.90(a)(1) Prohibits Deeming From a Non-responsible Person.

45 C.F.R. §233.90(a)(1) provides in pertinent part:

> [T]he inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph[11] is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by

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[10]In its amicus brief, Nevada claims California's policy does not reduce the needs standard, just the payment. Brief of Amici Curiae of the States of Nevada, Alaska, et. al. at 12 - 13). However, both the needs standard and the payment amount are determined by the number of people in an assistance unit. So, in fact, when units are combined, the state is also reducing the needs standard. For example Mrs. Edwards' granddaughter's needs were reduced from $355 to $241 per month by her inclusion with her cousins. California's need standard for one was $355; for two it was $583 ($291.50 per person); for three it was $723 ($241 per person). California Welfare & Institutions Code §11452 (1991 need standard).

[11]Those persons listed in the regulation whose income a state may take into account are natural or adoptive parents, or legally responsible stepparents. See 45 C.F.R. §233.90(a)(1).

the state. (Emphasis added).

The language of the regulations makes it clear that a state may not assume income or support from "any individual other than" a parent or legally responsible stepparent. Despite this clear language, petitioners argue they can deem between non-siblings, and from non-parent caretakers to needy children. In doing so, petitioners are reading the regulation as merely excluding some individuals, rather than any individual. Such a reading impermissibly narrows the scope of the regulation. See United States v. James, 478 U.S. 597, 604 (1986) (the word "any" is interpreted very broadly because "[i]t is difficult to imagine broader language.")

Petitioners also argue that §233.90(a)(1) was not intended to prohibit a non-parent (i.e., non-legally responsible) caretaker's inclusion in an assistance unit or to preclude counting income between members of the AU. (Pet. 35). But it is the relative's presence in the household that leads to the state's requirement that the relative be in

the AU. The state is attempting to avoid the prohibition against assuming income is available from anyone other than the parent or legally responsible stepparent by forcing the caretaker into AU, because by definition, once in an assistance unit, her income and resources would be counted. As a result, the state is clearly assuming the income from a non-parent caretaker is available to the needy child solely because they are in the same household. As is evident from the language of this section, forcing the inclusion of anyone other than a parent, or responsible stepparent into the AU, and the concomitant presumption of the availability of income, violates §233.90(a)(1).

The state also argues that 45 C.F.R. §233.90(a)(1) was adopted solely in response to King v. Smith, supra, 392 U.S. 309, to clarify what was meant by "being deprived of parental support." Relying upon HHS Action Transmittal 94-6, petitioners conclude that 45 C.F.R. §233.90(a)(1) does not prohibit a state from imputing a non-responsible person's income to a needy child. (Pet. 35, Pet. App. 39).

This argument is contradicted by the language of the regulation, by its history, and by the decisions applying it.

Petitioners rely upon the first sentence of §233.90 to support their position that this regulation is confined to a determination of deprivation. (Pet. 29). While it is true that the first sentence of §233.90(a)(1) applies only to the determination of deprivation, this sentence is not the basis for respondents' claims.[12] The second sentence is much broader and deals with both deprivation ("a finding of ineligibility") and with the "availability of income:"

> Under this requirement, the inclusion in the family, or the presence in the home, of a "substitute parent" or "man in the house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the state.

Id. (emphasis added).[13] Petitioners' interpretation limiting

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[12]The first sentence of §233.90(a)(1) provides that if a parent is absent, the child is "deprived" even if there is another "substitute parent." For full text see Pet. App. 32.

[13]Those persons listed in the regulation whose income a state may take into account are natural or adoptive parents,

(continued...)

this regulation to issues of deprivation would render the last phrase of this sentence meaningless.

The history of the regulation also shows that although the regulation was initially promulgated to implement this Court's decision in King v. Smith, 392 U.S. 309, it has always also prohibited assuming the availability of income from any person in the household other than a parent or responsible stepparent. Contrary to petitioners' assertions and HHS' current position, HEW made it clear that this section was not limited to the definition of deprivation:

> As provided in Interim Policy Statement #4 in the consideration of all income and resources in establishing financial eligibility and the amount of the assistance payment, . . . the income only of the parent described in paragraph (a) . . . will be considered available for children in the household. . ..

45 C.F.R. §203.1(b), 33 Fed. Reg. 11290 (August 8, 1968) (citation omitted) (emphasis added). Furthermore, at the

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[13](...continued)
or legally responsible stepparents. See 45 C.F.R. §233.90(a)(1).

time of this pronouncement, HEW was well aware that caretakers and other relatives could receive AFDC with a needy child. Yet HEW was precise in stating: "only" the parents' income could be considered as available.[14]

In addition, case law applying §233.90(a)(1) and its predecessor, 45 C.F.R. §203.1, lays to rest any question about its applicability to the determination of available income. This Court, referring to 45 C.F.R. §203.1, stated that HEW had promulgated a regulation providing that "the income of a man not ceremonially married to the mother of the dependent children may not be treated as available to the children unless there is proof that he has made actual

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[14]HHS claims that the deletion of the second sentence of 45 C.F.R. §203.1 in 1981 clarified that income between AU members may be presumed available. (AT-94-6, Pet. App. 39-40). This of course begs the questions of whether this provision forbids consolidation of assistance units. (See supra p. 23-24. See also p. 45-46 discussion of Lewis v. Martin.) The regulatory history contains no explanation for the change. 46 Fed. Reg. 46750, et seq. (September 21, 1981). It is more likely that the change was made because states were now free to deem a non-legally responsible stepparent's income, so the second sentence was no longer accurate. Furthermore, the agency retained the "any individual other than" language. (See p. 26, supra.)

contributions." Lewis v. Martin, 397 U.S. 552, 554 (1970). Furthermore, in Van Lare v. Hurley, 421 U.S. 338 (1975), this Court applied an earlier version of §233.90(a)(1) to invalidate a state policy which had nothing to do with whether a child was deprived of parental support, but rather reduced the amount of assistance paid to a child based on the presence in the household of non-legally responsible persons. See also McCoog v. Hegstrom, 690 F.2d 1280 (9th Cir. 1983) (invalidating rule authorizing lower AFDC grants to abandoned children living with non-needy relatives).

Clearly, 45 C.F.R. §233.90(a)(1) bars assumption of the availability of income of "non-parents" such as the cousins and caretaker relatives in the families represented in this action. In counting the income of the caretaker and the non-sibling, the state reduces the aid payment to the extended family members and to the caretaker's own family. This violates §233.90(a)(1) because the income of someone other than the non-siblings' parents reduces the grants the

children receive.

3. 45 C.F.R. §233.20(a)(3)(ii)(D) Provides That Income May Not Be Considered Available Unless the Person Has a Legal Interest in the Income and It Is "Actually Available" To the Child.

The most general statement of the availability principle is contained in 45 C.F.R. §233.20(a)(3)(ii)(D):

> [t]o the extent not inconsistent with any other provision of this chapter, income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance.

This rule permits states to consider income and resources in two circumstances: when they are actually available to the child and when the child has a legal interest such that he or she can actually use the money. The California policy presumes that income from relatives is available to a needy child without any determination that it is actually available. This would be permissible if the child had a legal interest in the income or resources, as in the case of a parent's income, because of the parent's duty to

support the child. However, the child does not have a legal right to the income and resources of relatives who have no legal obligation of support. California's presumption therefore counts money as available without proof of its actual availability.

For example, under the California policy, in a family consisting of an aunt, her children, and her niece, the earnings of the aunt will reduce the AFDC benefit to the entire AU, including the niece. While the aunt's own children have a right to her earnings, the niece has no right to support from the aunt's earnings and has no legal ability to require that the earnings be made available to her. Nevertheless, her AFDC benefit has been reduced. Similarly, lump sum income received by one of the aunt's children would make the entire AU, including the niece, ineligible until the lump sum income period of ineligibility has expired.[15] However, the niece has no legal claim to

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[15]42 U.S.C. §602(a)(17) provides that a lump sum will be considered income to all members of the AU, and that (continued...)

her cousin's personal injury award and no legal ability to make the funds available for her support. The niece is doubly deprived -- her AFDC is lost and she cannot force the cousin to share his income since the cousin has no legal duty to do so.

Respondents argue that this regulation is not violated because they are only considering the income of persons within the AFDC assistance unit as they have discretion to define it. (Pet. 36). This statement begs the question -- whether the state may use its authority to define assistance units in such a way as to assume pooling of income by non-legally responsible persons. Respondents can no more use the device of requiring a single assistance unit to assume the availability of income to a needy child than the multitude of

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[15](...continued)
when a member of the AU receives a lump sum, the entire AU is ineligible for a period that equals the sum of all income divided by the standard of need. 42 U.S.C. §602(a)(17). For example, if the cousin received a personal injury aware of $5,000 and the standard of need for that AU were $500, the entire AU, including the niece, would be ineligible for AFDC for 10 months.

other schemes for assuming contributions from non-responsible persons that have been struck down by this Court.

In Bowen v. Gilliard, supra, 483 U.S. 587, this Court upheld the imputing of income when Congress expressly required it among siblings. However, in the instant case, Congress has not expressly authorized the imputing of income and resources from non-siblings or other relatives who are not parents or legally responsible stepparents, and in fact, 45 C.F.R. §233.20(a)(3)(ii)(D) expressly forbids it.

C. The Availability Principle Is Not Limited to the Income of Non-Needy Caretakers.

Petitioners, relying on AT-94-6, argue that the availability principle does not apply to individuals inside the AU. (Pet. 33, 35, 36). On this basis petitioners and the Solicitor General try to distinguish King v. Smith, supra, 392 U.S. 309, Lewis v. Martin, supra, 397 U.S. 552, and Van Lare v. Hurley, supra, 421 U.S. 338, as well as the Ninth Circuit's decision in McCoog, supra, 690 F.2d 1280, by arguing that the non-legally responsible relatives in those

cases were outside the AU and not AFDC recipients and that an uncertainty of support does not exist. (Pet. 34-36; S.G. 14). Thus, while petitioners concede they cannot reduce the AFDC paid to abandoned children because they live with wealthy grandparents (Pet. 37), they claim they can do so when the grandparents and their own children are poor. This incongruous result of offering more financial support to children living with wealthier relatives than with poor relatives is not supported by either the language of the regulations or the case law interpreting them.

None of the three regulations is limited to non-needy relatives. One regulation prohibits states from "assuming the availability of income" from "any individual" not legally obligated to support the needy child. 45 C.F.R. §233.90(a)(1) (emphasis added). A second regulation prohibits states from reducing the amount of AFDC "because of the presence in the household of a non-legally responsible individual." 45 C.F.R. §233.20(a)(2)(viii)

(emphasis added).[16] The third regulation flatly prohibits states from considering income from any source unless it is "actually available and the recipient... has the legal ability to make such sum available for support and maintenance." 45 C.F.R. §233.20(a)(3)(ii)(D).

It must be presumed that if Congress or the federal agency wanted to limit the applicable law to non-needy relatives, it would have explicitly said so. Cf. United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 244-48 (1989) (where Congress did not adopt words of limitation used elsewhere in same statute, court based on plain reading of statute rejected contrary interpretation); see also United States v. James, 478 U.S. at 604 ("any" interpreted very broadly because "[i]t is difficult to imagine broader language").

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[16]This regulation, unlike the other two, does refer to "the assistance unit," but it does not say that the non-legally responsible person must be outside the assistance unit. The point of the regulation is that unless the person has legal responsibility to support everyone in the assistance unit, his presence is not a permissible basis for reducing the grant.

Finally, there is no authority in this Court's decisions for such a limited interpretation of the availability rule. Rather, this Court has consistently defined the availability principle solely in terms of who is legally responsible for the needy child under state law and not based on whether someone is inside or outside the AU. King v. Smith, 392 U.S. at 329; Lewis v. Martin, 397 U.S. at 558-59; Van Lare v. Hurley, 421 U.S. at 347. Not only do the availability regulations apply but they also prohibit forcing caretakers into the assistance unit.

II. CONTRARY TO PETITIONERS' ASSERTIONS THE AFDC STATUTE DOES NOT VALIDATE CALIFORNIA'S VIOLATION OF THE AVAILABILITY REGULATIONS

Relying upon Beaton v. Thompson, 913 F.2d 701 (9th Cir. 1990), the court of appeals in Edwards held that the consolidated filing unit rule violated the plain language of several federal regulations which prohibit states from attributing income to an AFDC child unless it is actually available. Petitioners and the Amici misconstrue the statutory framework of the AFDC program in their attempt

to explain why the availability regulations should not apply.

Petitioners argue that the "availability" principle is inapplicable whenever a state exercises its discretion to define assistance units; they argue that these principles only come into play once the AU is defined. (Pet. 15, 31). The Solicitor General claims that the federal AFDC statute, particularly §602(a)(7)(A), grants the states the authority and flexibility to evade the availability requirements. (S.G. 17). To the contrary, under several AFDC statutory provisions, including 42 U.S.C. §602(a)(7), relatives have always had the right to choose whether to apply for aid with the needy child, or to remain outside the AU.

California suggests that it is appropriate to establish consolidated AUs to recognize the alleged savings from shared expenses. (Pet. 13, 17). However, Congress has already mandated a scheme that states must follow if they choose to take into account the economies of scale of joint living situations. 42 U.S.C. §612.

States do not have the discretion, as California claims,

to form assistance units in derogation of these statutory AFDC provisions or of the regulatory availability principles. The AFDC statutory provisions offer no support to petitioners, but rather demonstrate that no basis exists for so circumventing the availability principle.

A. 42 U.S.C. §602(a)(7)(A) Does Not Permit the Consolidation of Assistance Units Which Petitioners Seek.

Petitioners and the Solicitor General appear to claim that the language of 42 U.S.C. §602(a)(7)(A) gives the state virtually unfettered discretion to combine assistance units. (Pet. 11-12; S.G. 4, 17, 18-19 n. 5). 42 U.S.C. §602(a)(7)(A). However, a state's general latitude in operating its AFDC program cannot be used to circumvent specific federal rules governing the provision of benefits. Shea v. Vialpando, 416 U.S. at 266 n.13.

42 U.S.C. §602(a)(7)(A) provides that the state:

> shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the state determines should be considered in

> determining the need of the child or relative claiming such aid;

The Solicitor General argues that a literal reading of this statute supports California's consolidated assistance unit filing rule (S.G. 6, 18-19 n 5).[17] While it is unclear which of the two clauses in §602(a)(7)(A) petitioners rely upon, neither part of this statute has ever been interpreted as broadly as petitioners suggest. Furthermore, in determining the plain meaning of a statute, a court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole. KMart Corp. v. Cartier, Inc., 486 U.S. 281, 291-2 (1988). In looking at the design and language of the AFDC statute, it is evident that a state's discretion is limited by the federal regulations and the availability principle. The regulations ensure that states cannot create assistance units which would result in income being counted which is not actually available or

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[17]The Solicitor General appears to have inadvertently omitted part of the last clause, resulting in a misleading quotation. See p. 41 for the correct language.

which results in the assumption that support for the child exists. King v. Smith, 392 U.S. at 319 n.16. The availability requirement "clearly comports" with 42 U.S.C. §602(a)(7)(A). Id.

1. The Use of the Phrase "Any Child or Relative" in 602(a)(7)(A) Does Not Justify the State's Rule.

Petitioners rely heavily in their analysis of §602(a)(7)(A) upon the language of the first clause which allows states to include the resources of "any child or relative claiming aid." However, this phrase has never been interpreted to include all family members in a household.

Caretaker relatives have always had the right to choose whether to apply for aid with the needy child or to remain outside the AU. (Pet. 15). Furthermore, as discussed supra at p. 16-17, 40-41, families have had the right to exclude or include members to ensure they received adequate benefits to meet their needs. Gilliard v. Craig, 331 F. Supp. at 593; Bowen v. Gilliard, 483 U.S. at 593. When Congress limited that choice for parents and siblings

by adding 42 U.S.C. §602(a)(38), it explicitly recognized that it was restricting the right to choose that otherwise existed. S. Print No. 98-169, p. 980 (1984), cited in Bowen v. Gilliard, 483 U.S. at 593. Since 42 U.S.C. §602(a)(7)(A) existed at the time that Congress passed §602(a)(38), Congress clearly did not conclude that §602(a)(7)(A) already gave states unfettered discretion to force individuals into the assistance unit. Therefore, these relatives retain the right to choose, notwithstanding 42 U.S.C. §602(a)(7)(A).

Furthermore, the history of §602(a)(7) and the decisions of this Court demonstrates that the term "relatives" has limited meaning. When the phrase "relative" was added to §602(a)(7)(A) in 1962, Congress did not indicate any intent to expand the states' authority to combine assistance units. Indeed, the addition of the word relative was merely a technical change. See Drysdale v. Spirito, 689 F.2d 252, 258 (1st Cir. 1982) (referring to the amendment as a "technical change"). This change was

necessary because several years earlier, Congress had authorized aid for a child's caretaker relative, as well as for the child. Id.[18] This technical change simply clarified that when a caretaker relative chose to apply for aid with the child, the caretaker's income and resources would be assumed available to the child.

If petitioners' overly broad reading of the phrase "relative and child claiming aid" were correct, states could consider any related child or relative's income to be available to the child, and families would not have had the option (as they did before 1984) to exclude children with their own income from their assistance unit. However, states were not free to require the inclusion of children with resources and income in a family's assistance unit until Congress passed the mandatory filing unit. 42 U.S.C. §602(a)(38).

Additionally, the petitioners' and amici's arguments

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[18]See Drysdale, supra at 258 for a full description of this legislative history.

lead to results that violate federal law. Under petitioners' interpretation, a state could have counted the income of a stepparent by forcing him or her into the child's assistance unit prior to Congress' passage of the provision in federal law that allowed stepparent income to be counted, 42 U.S.C. §602(a)(31). However, as this Court made clear in Lewis v. Martin, supra, 397 U.S. 552, states were previously not free to count the income of a stepparent in determining a child's aid, precisely because stepparents do not have the same legal duty to support the child as a parent. Id. at 559-60. The Lewis decision was based on the availability principle. Obviously, if a state cannot count the income of a person outside the assistance unit, it cannot circumvent the availability principles by forcing the person into the unit.

Finally, the state's argument is defective because it fails to distinguish between the situation where a caretaker relative applies for aid for herself together with a child from the case where a caretaker applies on behalf of a child and

is not seeking any aid for herself.

Section 602(a)(7)(A) permits the inclusion of the relative caretaker's income and resources only when she is seeking aid for herself. Drysdale v. Spirito, 689 F.2d at 258-259.[19] Section 602(a)(7)(A) provides no authority to force a caretaker relative into an assistance unit. Rather, this section provides that, in exchange for her own receipt of AFDC (apart from the child), the caretaker's own income will apply against the AFDC grant, despite the fact that the caretaker is not legally obligated to support the child. When a caretaker applies on behalf of an abandoned child to meet the child's needs, the caretaker is not claiming aid for herself. The caretaker achieves no benefit, and as a result, cannot be forced to have her income and resources included. In essence, the caretaker is not needy because her

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[19]In Drysdale, then-Judge Breyer analyzed the term "relative" as used in 42 U.S.C. §602(a)(7), stating: the "phrase [relative] as used in subsection (a)(7) refers to a caretaker claiming aid to meet her own needs, not merely seeking benefits to meet the needs of her children". Drysdale, 689 F.2d. at 258-59. (Emphasis added.)

needs have been met, either by her own financial resources or through her own claim for aid with her own child.[20]

2. The "Essential Person" Language of §602(a)(7)(A) Does Not Justify Petitioners' Consolidation Rule.

Petitioners also seem to rely upon the second clause of §602(a)(7)(A). (Pet. 11-12; S.G. 25; Amicus Curiae Brief of Minnesota et al., p. 12). The second clause allows states to consider the income of "any other individual (living in the same home as such child and relative) whose needs the state determines should be considered in determining need of the child or relative". Petitioners' reliance on this clause as support for their power to define assistance units unfettered by the availability principles is also misplaced.

In 1968, Congress added the second part of §602(a)(7)

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[20]If the caretaker has no children of her own, but rather two sets of non-siblings, she would apply for aid with the first set, but only for aid on behalf of the second set. Respondents do not contend that the availability principle is violated if, for instance, a caretaker with no children of her own and her niece are on a two-person grant.

to codify what is known as the "essential person" rule. See McKenney v. Sullivan, 743 F.Supp. 53, 56-58 (D. Me. 1990); Solman v. Shapiro, 300 F.Supp 409, 414-15 (D.Conn. 1969), aff'd 396 U.S. 5 (1969)(setting forth the history of the essential person rule). Under the essential person doctrine, the federal agency would allow states to increase grants to meet the needs of someone essential to the child's well-being who was otherwise not eligible for aid and not a member of the AU - such as a 20-year old sibling who cares for the child while the parent works. The essential person's needs are counted, the grant to the child is higher, but the essential person is not on aid. Solman, 300 F.Supp. at 415; see also Drysdale v. Spirito, 689 F. 2d at 258. The only people whose needs states can consider under this portion of §602(a)(7)(A) are those who are not eligible for AFDC. Id.

Since the cousins, nieces, nephews and other individuals forced into one AU by petitioners' policy are eligible for AFDC, they cannot be "essential persons." The

second clause of §602(a)(7)(A), therefore, does not authorize the California policy.

Furthermore, states cannot force non-responsible relatives into units by calling them "essential persons." Under longstanding HHS policy and federal regulations, the choice to include a particular family member as an essential person is left to the recipient. 58 Fed. Reg. 60,134 (Nov. 15, 1993), to be codified at 45 C.F.R. §233.20(a)(2)(vi)(B) (set out in the Appendix to this Brief, Appendix 5); McKenney, 743 F.Supp. at 61-62.

B. Petitioners' Policy Is an Invalid Expansion of the Mandatory Filing Unit Rule and Nothing in Either 42 U.S.C. §602(a)(38) or This Court's Holding in Bowen v. Gilliard Validate the California Policy.

Petitioners claim that Bowen v. Gilliard, supra, 483 U.S. 587, provides support for their policy and that the same rationale as motivated Congress in enacting the mandatory filing unit rule, 42 U.S.C. §602(a)(38), justifies their consolidation rule. (Pet. 18, 28, 33). Nothing in either (a)(38) or this Court's decision in Bowen justifies

petitioners' policy. To the contrary, petitioners' policy is an invalid expansion of (a)(38).

In adopting the mandatory filing unit rule, Congress specified that the nuclear family, i.e. parents, adoptive parents, siblings, and half siblings, must file for AFDC as a single assistance unit if they live together. 42 U.S.C. §602(a)(38). However, petitioners' policy requires the AFDC assistance unit to include individuals whom Congress excluded when it specified who must file for AFDC together. Congress did not require caretaker relatives other than parents to file together with the children living with them. Neither did Congress require the caretaker's needy children and the abandoned children to file as one assistance unit.

In this case, petitioners have improperly enlarged upon Congress's decision to create a limited exception to the right to exclude family members. They do so by adding aunts, uncles, grandparents, and abandoned children to the list of persons who must file as a single assistance unit. In

their administration of AFDC programs, states are not free to further restrict the conditions imposed by Congress. Townsend v. Swank, 404 U.S. 282, 286 (1971) (striking down a state rule restricting AFDC benefits to only high school students when Congress only restricted benefits to 18-20 year olds attending school). Congress could have chosen to add these relatives when it created this limited exception. But it did not. By refusing to do so, Congress reaffirmed its intent (and the existing regulations and court decisions) to prohibit such imputing of income.

Petitioners and the Solicitor General also claim that, since Congress passed §602(a)(38) to reduce the AFDC budget, it would be an anomalous to conclude that the same statute would prohibit states from achieving similar savings by combining extended family members into a single AU. (Pet. 28; S.G. 26, citing Bray v. Dowling, 25 F.3d 135, 142 (2d Cir. 1994), petition for cert. pending, No. 93-5845.) However, Bray did not examine or discuss the longstanding right of caretakers to exclude family members.

Most importantly, Congress intended its mandatory filing unit rule apply only to immediate family members. For instance, Congress did not require that stepchildren be included in the assistance unit. Deficit Reduction Act, 1984, Explanation of Provisions Approved by the Committee on March 21, 1984, Committee on Finance, United States Senate, S.Prt. 98-169, 98th Congress, 2d Session 980 (1984). Indeed, these children would not be required to be consolidated into the AU containing their stepsiblings, even if their parent (the stepparent to the AFDC child) was required to be part of that AU.[21] 57 Fed. Reg. 30,136 (July 8, 1992). If Congress believed that the relationship of stepsiblings was distant enough to exempt them from the family filing unit rule, and thus not presume the pooling of income, then clearly states should not be able to force even more remote relatives with no financial

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[21]If state law provided that a stepparent had the same duty of support for his stepchildren as a natural parent, the stepparent would be treated as a parent and required to be part of the AU under 42 U.S.C. §602(a)(38).

responsibility together into one unit.

Finally, petitioners mistakenly claim that Bowen supports their consolidation assistance unit rule. (Pet. 33). Bowen held only that it was constitutional for Congress to create a mandatory single filing unit. 483 U.S. at 587. Respondents do not dispute that Congress could require a single filing unit for Respondent class members and their caretakers. However, nothing in Bowen authorizes the states to create additional mandatory filing unit rules absent Congressional authority. To the contrary, Congress specifically recognized that it was creating an exception to the general policy that permits families to choose whether to include or exclude individuals from the AU. Bowen v. Gilliard, 483 U.S. at 593 (quoting S. Print No. 169, 98th Cong., 2d Sess. 980 (1984)).

C. Congress Has Specified a Valid Mechanism for States to Achieve Savings and Recognize Economies of Scale in Shared AFDC Households.

The California policy is based upon the assumption --

actually an irrebuttable presumption -- that families share income and resources, and have no greater expenses than a nuclear family. Similarly, the Solicitor General argues that the per capita reduction in income to the members of the consolidated unit "derives from the state's presumption that a household will enjoy economies of scale as it grows." S.G. 16.[22] This presumption is a violation of the availability principle. This Court specifically held that a state may not reduce AFDC based on a presumption of economies of scale, absent a legal responsibility to support. Van Lare v. Hurley, 421 U.S. at 34; See also McCoog v. Hegstrom, 690 F.2d at 1287; Gurley v. Wohglemuth, 421 F. Supp. 1337, 1345 (E.D. Pa. 1976).

Congress did, however, provide a specific exception

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[22]The Solicitor General states that the economies of scale based on family size cannot be challenged, under Dandridge v. Williams, 397 U.S. 471 (1970) (S.G. 17). The assistance unit at issue in Dandridge contained only parents and their own children. Nothing in Dandridge authorizes states to make such assumptions of pooling of income in households where the members are not legally responsible for the support of one another.

to the availability principle that permits states to reduce AFDC grants based on savings achieved through economies of scale when recipients live with individuals who have no legal obligation to support them. 42 U.S.C. §612; see also 46 Fed. Reg. 53,720-21 (Oct. 30, 1981) (Congress passed §612 in response to the availability regulations developed by the Secretary after the Court's Van Lare decision); S. Rep. No. 494, 97th Cong., 2d Sess. 49, 1982, reprinted in 1982 U.S.C.C.A.N. 825 ("AFDC regulations generally prohibit the states from prorating or otherwise reducing the AFDC benefits solely because of the presence in the household of an individual who is not legally responsible to support the family. This general prohibition was modified by Public Law 96-272 [the 1980 proration statute] to allow states to prorate the shelter and utilities portion of the AFDC benefit.")

In order to prorate household expenses, the state must follow the procedures and requirements set forth in 45 C.F.R. §233.20(a)(5) which require states to articulate a

reasonable basis for their policy and the scope of their prorating plan.[23] The proration authorized under §612 applies equally regardless of the household composition. Thus, proration can apply when two or more AFDC recipient groups live together, or when an AFDC recipient lives with non-needy individuals. This avoids the troubling inequity of the consolidated assistance unit filing rule at issue in this case, under which the "economies of scale" only are attributed to households containing poor children and relatives, and not those in which wealthier relatives live. A §612 proration plan, unlike the consolidated assistance unit filing rule, also assures prorating will take into account only those items which actually achieve an economy of scale, such as housing and utilities, and will exclude items which cannot create economies of scale, such as personal items. While it may be reasonable for states to allocate scarce welfare dollars by taking into account

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[23]Petitioners have never disputed that their consolidated assistance unit rule is not a §612 proration plan.

economies of scale, Congress has directed the exclusive means to do so, pursuant to a §612 prorating plan. McCoog v. Hegstrom, 690 F.2d. at 1288.

III. RECEIPT OF AFDC DOES NOT MAKE CARETAKER RELATIVES LEGALLY RESPONSIBLE FOR SUPPORTING THEIR NEEDY RELATIVES

Petitioners, relying on the Second Circuit's decision in Bray v. Dowling, supra, 25 F.3d. 135, assert that consolidation and consequent pooling of income is allowed because 42 U.S.C. §605 creates a legal duty which requires a caretaker to spend the AFDC grant on the child. This argument is flawed in three important respects. First, it ignores the language of the regulation which limits legal responsibility to the support duty owed under state law. Secondly, even if §605 somehow created a duty of a caretaker to make AFDC income available to a child, the statute does not govern the availability of the child's own income to the caretaker and the non-sibling children. Finally, any possible duty under §605 would not require the

caretaker relative to make her outside income available to the abandoned child.

A. Petitioners' Presumption of the Caretaker Relative's Legal Responsibility to Support Conflicts with Federal Regulations, State Law and Case Law.

The argument that the federal AFDC statute permits the assumption that a non-parent caretaker is legally responsible for the AFDC child is specifically contradicted by the text of one of the regulations at issue. Section 233.90(a)(1) states that contributions may be assumed only from a person "legally obligated to support the child under state law of general applicability." 45 C.F.R. §233.90(a)(1) (emphasis added). This assumption cannot be made based on not a federal statute which pertains only to AFDC recipients.

Similarly, the decisions of this Court consistently require a legal responsibility for the child under state law to the same extent as a natural parent's before a contribution of support may be assumed. Thus, in Lewis v. Martin,

supra, 397 U.S. at 559-60, this Court said:

> Any lesser duty of support [than a parent's] might merely be a device for lowering welfare benefits without guaranteeing that the child would regularly receive the income on which the reduction is based .... In the absence of proof of actual contribution, [the state] may not consider the child's 'resources' to include ... the income of a non-adopting stepfather who is not legally obligated to support the child as is a natural parent... (Emphasis added).

Simply because Congress requires that a needy child live with a caretaker relative does not mean that the income of that relative may be imputed to the child in the absence of legal responsibility. Indeed, 45 C.F.R. §233.90(a)(1) specifies the "substitute parent" as an individual whose income may not be deemed available to the child. What is a "substitute parent" if not a non-parent caretaker?

B. Section 605 Does Not Authorize States to Presume the Availability of Income Between Children.

Petitioners' argument regarding caretaker relatives ignores the composition of the Edwards class: non-sibling

children.[24] Without any legal justification, petitioners' policy reduces the AFDC grants by presuming that non-legally responsible non-sibling children will support each other.

Respondents challenge all illegal forced pooling of income or assumption of support, whether between the children and the caretaker or between the non-sibling children. For example, in the Edwards household, the caretaker relative, Mrs. Edwards, is non-needy and not part of the assistance unit. She does not receive AFDC benefits; only her two grandnieces and grandchild do. Nevertheless, by forcing all the children into one AFDC case, petitioners' policy still illegally presumes that the non-sibling children, who have no legal responsibility to each other, will support each other. For example, if two abandoned sibling children, one of whom has $300 in Social Security

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[24]The definition and, accordingly, respondents' arguments only apply to households with two or more non-sibling children who are consolidated into a single assistance unit. See Class Definition within District Court Order Granting Class Certification. (Pet. App. 26).

Survivor's benefits, are taken in by their aunt and cousin, the consolidated assistance unit's income would be reduced by the amount of the child's countable income. The family would receive only a supplemental AFDC grant, and would be expected to use the child's own income to support the extended family.

The petitioners suggest, as a resolution to this problem, that the child with income "may simply not apply" for AFDC. (Pet. 40, fn. 19). This child, however, cannot avoid having her income count by not applying, because she is required to be in the assistance unit with her sibling, who has no income. To avoid having the one child's income counted, both children would have to remove themselves from the grant. Therefore, if both children did not apply for AFDC to avoid supporting their cousins, they would be forced to live on $300 a month income, instead of the $490 which the state determined was their minimum subsistence payment. (See Pet. 14).

Furthermore, if Mrs. Edward's grandchild were to

receive a lump sum payment of money (for example, an inheritance or personal injury award), under federal law everyone in the AU would be disqualified, and pursuant to 42 U.S.C. §602(a)(17), the abandoned grandnieces would be expected to live off their cousin's income, even though it is never actually legally available to them. 42 U.S.C. §602(a)(17).

Petitioners' policy causes this deeming between children even in assistance units in which there is no needy caretaker relative. Petitioners cannot argue that the cousins have a "special" relationship or obligation under §605 to share their AFDC or other income

C. Section 605 Cannot Justify Deeming of the Caretaker's Own Income.

Nothing in 42 U.S.C. §605 justifies petitioners' policy that the non-legally responsible caretaker must make his or her own income, not just AFDC benefits, available to the needy child. While petitioners could count the income of a non-legally responsible caretaker relative if that relative is eligible for AFDC solely as the caretaker of an abandoned

child and the caretaker chooses to be included in the assistance unit with that child, it does not follow from this restriction that the income of the caretaker may be deemed available to the child where the caretaker does not make this choice.[25] Where the caretakers are required to be included in the AFDC grant because they are parents of other needy children, federal regulations only authorize the caretaker's income to be counted as available to their own children. 45 C.F.R. §233.90(a)(1).

IV. HHS' INTERPRETATION OF THE AVAILABILITY REGULATIONS IS NOT ENTITLED TO DEFERENCE

A. The Only Clear Statement From HHS on the Issue in This Case Is the 1994 Transmittal.

Petitioners and amici assert that HHS' position -- that the federal availability regulations do not conflict with California's filing unit rule -- is longstanding policy. However, until 1994, no official HHS position that the

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[25]Petitioners ignore that the AFDC statute offers assistance to a non-parent caretaker relative of a needy child. 42 U.S.C. §§601, 606(a).

availability regulations did not a limit the states' power to determine the composition of assistance units existed.

The Solicitor General states that the agency's position dates back to the promulgation of 45 C.F.R. 237.50(b)(4) in 1968. (S.G. 21). However, that regulation merely sets out how recipients are to be counted by states for purposes of receiving funds from the federal government. Furthermore, the regulation deals with a situation in which two families live together with two caretakers. Finally the language of the interim policy statement cited by the Solicitor General does not mention assistance units, only families. (See 33 Fed. Reg 10,234 (July 17, 1968)). Similarly, the 1976 memo from an HEW division administrator to a regional director cited in Bray, supra, 25 F.3d. at 142 and relied upon by the Solicitor General (S.G. 21) fails to mention the availability regulations or their impact on assistance unit composition.

Furthermore, the 1980 federal interpretation cited by the Solicitor General (S.G. 22) set forth in Allen v.

Hettleman, 494 F.Supp. 854 (D. Md. 1980) did not address whether the state's manner of consolidating assistance units conflicted with the availability regulations. Allen involved a three-generation household in which the AU members had clear legal obligations to support each other under state law. Id. This distinction regarding legal responsibility is significant.[26]

Likewise, petitioners and the Solicitor General incorrectly rely on Action Transmittal No. SSA-AT-86-1 and comments in the federal register from 1992 to buttress their position that HHS has long interpreted the availability regulations to permit California's filing unit rule. (Pet. 19, S.G. 22-23). Action Transmittal No. SSA-AT-86-1 (Jan. 13, 1986) and 57 Fed. Reg. 30,132, 30,135-36 (July 8, 1992).

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[26]See also, Mitchell v. Swoap, 35 Cal.App.3d 879, 888, 113 Cal.Rptr. 75 (1973) (a California case involving a three generation household, in which the court acknowledged that there would have been a "considerable and reasonable difference" if the case had involved persons who were not legally responsible for a particular dependent child.) The Allen court found Mitchell consistent with its decision. Allen, 494 F.Supp. at 865.

The 1986 action transmittal and the preamble to the final rules implementing the DEFRA amendment merely reiterate that states have some discretion to prescribe the composition of assistance units. Respondents do not claim that the states completely lack discretion to define the composition of assistance units; rather, respondents argue that state's power to so determine the composition of assistance units is limited by the federal availability regulations. Neither the 1986 action transmittal nor the preamble to the final rules implementing the DEFRA amendments address the issue of whether consolidating assistance units conflicts with the availability regulations.[27]

HHS has never had a long standing policy on the issue in this case. HHS' AT-94-6 is the only statement that directly addresses the issue in this case: whether the availability regulations forbid California's consolidated

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[27]The examples of required consolidation given in the 1986 Action Transmittal and the 1992 preamble to the federal regulations are not examples of the consolidated assistance unit rule because in each example the combined assistance unit has two caretakers.

filing unit ruling.

B. The 1994 Transmittal Is Not Entitled to Deference Because It Was Not Published Pursuant to the APA and Was Prepared as a Response to Litigation.

The circumstances surrounding the creation of the 1994 Action Transmittal limit the deference it is owed. This transmittal, prepared under the direction of Mary Jo Bane, formerly a defendant in Bray v. Dowling, is by its own terms a response to ongoing litigation. AT-94-6 (Pet. App. 34). In the transmittal, HHS acknowledges that it was prompted by lawsuits challenging the state consolidation rules. Id. A court need not defer to an agency's litigation position. Bowen v. Georgetown University Hospital, 488 U.S. 204, 312 (1988).

The Solicitor General, citing United States v. Morton, 467 U.S. 822 (1984), contends that the fact that 1994 explanatory action transmittal was issued in the course of litigation is of no consequence. (S.G. 24 n. 7) Yet Morton only held that the fact that a federal regulation is issued in

the course of litigation is of no consequence since Congress authorized the issuance of regulations so that problems arising in the administration of the statute could be addressed. Morton at 835-36 n.21. The Solicitor General's reliance on Morton to avoid Bowen v. Georgetown University Hospital is misplaced because an HHS explanatory transmittal is not a federal regulation.

Furthermore, the 1994 Action Transmittal goes beyond any past policy and beyond the plain meaning of the regulations. Such a significant change, particularly when it conflicts with a federal appellate decision such as Beaton, should be subjected to the rigorous rule making process required by the Administrative Procedures Act. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42, 55-58 (1983) (striking down agency's rule change for failure to give full consideration on the record in rule making process); see also Rust v. Sullivan, 111 S.Ct. 1759, 1769 (1991) (upholding a change in interpretation because agency engaged in a "reasoned analysis" after rule

making proceeding). The APA requirements provide for public notice and comment. 5 U.S.C. §553. This notice and comment phase allows the agency time to consider the impact of proposed regulations, and to weigh whether those regulations conflict with other provisions of law. The fact that HHS failed to follow this process means that HHS' action transmittal should not be given the deference due to a formally promulgated regulation.

C. AT-94-6 Is Not Entitled to Controlling Weight Because It Is Erroneous and Contrary to the Original Intent of the Secretary, and Inconsistent With the Plain Language of the Regulations.

On March 16, 1994, HHS issued an Action Transmittal stating that consolidated filing unit rules did not conflict with the federal availability regulations because the availability regulations only prohibit states from considering the income of persons who are not part of the assistance unit. AT-94-6 (Mar. 16, 1994), (Pet. App. 33). HHS' interpretation of the availability regulations as set forth in the 1994 HHS Action transmittal is erroneous and therefore

is owed no deference.

An agency's interpretation of its own regulations may not be given controlling weight if "an alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation." Thomas Jefferson University v. Shalala, 512 U.S. ___, 114 S.Ct. 2381, 2386-87 (1994) (internal quotation marks omitted).

The plain language of the regulations clearly prohibit a state from assuming that the income of a non-legally responsible person is available to dependent children or from reducing the children's grant merely because they reside with persons who are not legally responsible for them. (See discussion I.B., supra p. 19 et seq.) Nothing in the language of the availability regulations supports a distinction between the non-legally responsible persons inside the assistance unit and those outside the unit. (See discussion I.C., supra, p. 36.) The plain language of 45 C.F.R. §233.90(a)(1) indicates it is not limited to the issue

of whether the child's parent is absent; rather, it forbids counting income from anyone other than a parent. (See discussion I.A.2., supra p. 27.) Additionally, in analyzing whether these policies violated the equitable treatment regulations, HHS utterly fails to discuss one of those regulations at issue: 45 C.F.R. §233.10(a)(1). (Pet. App. 42). This regulation requires that equity must be measured against the "purposes" of the AFDC statute. 45 C.F.R. §233.10(a)(1). HHS' failure to discuss the equity question in the context of the purposes of the Act is yet another indication of the transmittal's flawed analysis.

Finally, HHS' current interpretation of the meaning of two of these regulations is contradicted by the statements of the Secretary at the time they were adopted. HHS now indicates 45 C.F.R. §233.20(a)(2)(viii) only applies to individuals not in the assistance unit. Pet. App. 37. At the time of its adoption, however, HEW indicated the regulation barred "forcing" a contribution from a "non-legally liable" person. 42 Fed. Reg. 6583 (February 3, 1977). (See

discussion, supra p. 21.) With respect to 45 C.F.R. §233.90(a)(1), HHS currently takes the position that the regulation is only concerned with a finding of whether a child is deprived of parental support and care. (Pet. App. 38-39). However, in 1968, HEW indicated the regulation had a much broader impact and applied to the grant computation as well as questions of eligibility. 33 Fed. Reg. 11290 (August 8, 1968). (See discussion, supra p. 30.) HEW also clearly indicated that only a parent's income could be presumed to be available to a needy child. Id.

Additionally, the analysis of the availability regulations is flawed because the agency assumes that consolidation is allowed and examines the regulations on that basis. In doing so the agency fails to address the central issue in this case: whether the availability regulations forbid the consolidation of assistance units of extended family members in the first place.

V. THE CALIFORNIA NON-SIBLING FILING UNIT RULE VIOLATES FEDERAL REGULATIONS THAT REQUIRE EQUITABLE TREATMENT AMONG AFDC RECIPIENTS

Two federal regulations require that a state's AFDC plan must equitably treat "individuals in the light of the provisions and purposes of the ... Social Security Act" and determine the amount of assistance on an equitable basis. 45 C.F.R. §§233.10(a)(1), 233.20(a)(1)(i).

Petitioners state that the consolidated assistance unit rule is equitable because it merely results in same-sized households receiving the same grant. This argument misses the point. The issue is not whether the policy is equitable in the abstract, but whether it is equitable in light of the language and purposes of the Social Security Act. The purposes of the Act are to:

> encouraging the care of ... children ... in the homes of relatives ... to help maintain and strengthen family life ... and ... to help relatives to attain or retain capability for the maximum self-support....

42 U.S.C. §601. Rather than encouraging relatives to take in their abandoned family members, the policy discourages

them. The policy destabilizes the lives of the very children this program is designed to protect. (See Statement of the Case, supra p. 5-9.) Instead of helping families attain the capability for maximum support, the policy takes money away from the family who takes in the abandoned child, through a reduction in the children's per capita income.

In addition, despite petitioners' claims, in the AFDC program, the same sized family groups often will receive different grants. This is evident when one looks at a household with two non-needy adults with two abandoned children. If the two adults are married they will receive $490 for the children. However, if the two adults are sisters, they could receive $299 for each child, totaling $588. This exemplifies the fact that it is not the "size of the household" which is the basis for the state's grant amounts, as it claims, but the state's presumption that with only one adult or married caretaker couple, the household money is pooled and the members mutually responsible.

The inequitable treatment which these abandoned

children receive is also apparent when the effect of the consolidation rule is viewed from the perspective of children. These children, through no fault of their own, are compelled to live with AFDC relatives. The state's consolidation rule unjustly favors dependent children who live with wealthy relatives over those who live with poor relatives. For example, a child who would ordinarily receive $299 if she were living with relatives who are not receiving AFDC will receive only $116 if she lives with an aunt and two cousins who receive AFDC.

Moreover, application of California's non-sibling filing unit rule is also inequitable to the caretaker family. When the caretaker relative or her children have outside income in addition to AFDC, all the income of these members is deemed available to all others in the assistance unit. For example, if a cousin receives income such as Social Security dependents' benefit, that income will be deemed to available to the non-sibling child. Thus, the California policy unjustly forces children who have no legal

obligation to contribute income to each other to do so merely because they both receive AFDC. Alternatively, if a child receives income and does not share it, the other children are doubly deprived: their AFDC payments are lowered, and they cannot make the child share her income since there is not legal obligation to do so. The consolidated filing unit erects a barrier to family unity and threatens the economic security of needy children by presuming the availability of income. It also circumvents the statutory means of accounting for economies of scale, which equitably treats all households, whether wealthy or poor, the same. For these reasons, the consolidated filing unit violates §§233.10(a)(1) and 233.20(a)(1)(i).

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CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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42 U.S.C. §602. State plans for aid and services to needy families with children; contents; approval by Secretary; records and reports; treatment of earned income advances

(a) Contents

(7) except as may be otherwise provided in paragraph (8) or (31) and section 615 of this title, provide that the State agency --

(A) shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid;

42 U.S.C. § 602(a)(38)

provide that in making the determination under paragraph (7) with respect to a dependent child and applying paragraph (8), the State agency shall (except as otherwise provided in this part) include --

(A) any parent of such child, and

(B) any brother or sister of such child, if such brother or sister meets the conditions described in clauses (1) and (2) of section 606(a) of this title or in section 607(a) of this title, if such parent, brother, or sister is living in the same home as the dependent child, and any income of or available for such parent, brother, or sister shall be included in making such determination and applying such paragraph with respect to the family (notwithstanding section 405(j) of this title, in the case of benefits provided under subchapter II of this chapter);

42 U.S.C. § 605. Use of payments for benefit of children

Whenever the State agency has reason to believe that any payments of aid to families with dependent children made with respect to a child are not being or may not be used in the best interests of the child, the State agency may provide for such counseling and guidance services with respect to the use of such payments and the management of other funds by the relative receiving such payments as it deems advisable in order to assure use of such payments in the best interests of such child, and may provide for advising such relative that continued failure to so use such payments will result in substitution therefor of protective payments as provided under section 606(b)(2) of this title, or in seeking appointment of a guardian or legal representative as provided in section 1311 of this title, or in the imposition of criminal or civil penalties authorized under State law if it is determined by a court of competent jurisdiction that such relative is not using or has not used for the benefit of the child any such payments made for that purpose; and the provision of such services or advice by the State agency (or the taking of the action specified in such advice) shall not serve as a basis for withholding funds from such State under section 604 of this title and shall not prevent such payments with respect to such child from being considered aid to families with dependent children.

42 U.S.C. § 612. Prorating shelter allowance of AFDC family living with another household

A State plan for aid and services to needy families with children may provide that, in determining the need of any dependent child or relative claiming aid who is living with other individuals (not claiming aid together with such child or relative) as a household (as defined, for purposes of this section, by the Secretary), the amount included in the standard of need, and the payment standard, applied to such child or relative for shelter, utilities, and similar needs may be prorated on a reasonable basis, in such manner and under such circumstances as the State may determine to be appropriate. For purposes of any method of proration used by a State under this section, there shall not be included as a member of a household an individual receiving benefits under subchapter XVI of this title in any month to whom the one-third reduction prescribed by section 1382a(a)(2)(A)(i) of this title is applied.

58 Fed.Reg. 60,134

2. Section 233.20 is amended by removing and reserving paragraph (a)(2)(vii) and revising paragraph (a)(2)(vi) to read as follows:

§233.20 Need and amount of assistance

(a) **

(2) ***

(vi) If the State chooses to establish the need of the individual on a basis that recognizes, as essential to his well-being, the presence in the home of other needy individuals, (A) specify the persons whose needs will be included in the individual's need, and (B) provide that the decision as to whether any individual will be recognized as essential to the recipient's well-being shall rest with the recipient.